Inventory of Arbitration Proceedings Based on Swiss Bilateral Investment Treaties (BIT)

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Introduction

Switzerland has an extensive investment protection treaty network, having entered into treaties with more than 100 states.[1] Not surprisingly, Swiss Bilateral Investment Treaties (BIT) regularly give rise to arbitration proceedings including landmark cases such as *SGS v Philippines*, and *SGS v Pakistan*.

The present inventory tries to capture cases that are in the public domain, identifying a few of their salient features – including the members of the relevant arbitral tribunal and the status of the proceedings – and summarising the main issues they covered. It does not consider cases that have not, or not yet, resulted in arbitration proceedings (for instance *Gennady Mykhailenko (Ukraine) and United Pipe Export Company (Switzerland) v Belarus*), matters that are known to the author but not public at this stage, or matters for which there are merely cursory press reports that cannot be verified. Disputes where the jurisdiction of the tribunal appears to have been based on a contract rather than a BIT are also excluded (for example, *Swiss Aluminium Ltd. (Switzerland) and Icelandic Aluminium Company Ltd. v Iceland* (ICSID ARB 83/1) and *M Meerapfel Söhne AG (Switzerland) v Central African Republic* (ICSID ARB 07/10)).

The inventory is in alphabetical order following the name of the claimant.

Where awards and decisions are published on the ICSID website, no further references are mentioned (https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s). Status details for

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1 See the Official Compilation of Swiss Legislation, in particular section 0.975 (http://www.admin.ch/opc/fr/classified-compilation/0.97.html#0.975); The UNCTAD treaty data base (http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults); Jean-Christophe Liebeskind, *State-Investor Dispute Settlement Clauses in Swiss BITs*, ASA Bull. 1/2002, pp. 27-57; Laurence Burger, *Swiss Bilateral Investment Treaties – A Survey*, Journal of International Arbitration (2010) pp. 473 – 503; Ricardo E. Ugarte, Franz Stirnimann Fuentes and Dolores Bentolila, Global Arbitration Review GAR know how data base (http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/29/switzerland/).

ICSID cases have also been obtained from the ICSID website, unless otherwise specified.

The inventory is, by nature, a work in progress. The author would be most grateful if readers could inform him of any additional cases arising from a Swiss BIT.

Claimant: *Alimenta SA (Switzerland)*

Respondent: *The Gambia*

Applicable BIT: *Switzerland – The Gambia*

Rules/Type of Arbitration: ICSID Case No. ARB/99/5

Type of Investment: Groundnut enterprise

Arbitral tribunal:
Charles Brower; Samuel Asante; Kenneth Rokison

Status of case/Decisions: Discontinuance of proceedings, 3 May 2001

Published: No

Outcome: Proceedings discontinued in light of settlement reached between the parties

Summary: None publicly available

Claimant: *Alpiq AG (Switzerland)*

Respondent: *Romania*

Applicable BIT: Switzerland – Romania; Energy Charter Treaty

Rules/Type of Arbitration: ICSID Case No. ARB/14/28

Type of Investment: Long-term energy delivery contracts

Arbitral tribunal:
Not yet fully constituted. Claimant appointed Klaus Sachs

Status of case: Pending

Summary: No award rendered. Following summary taken from Claimant's website: "*The request for arbitration concerns the supply contracts between the state-controlled and ostensibly insolvent Romanian energy company Hidroelectrica and Alpiq's two subsidiaries in Romania. Hidroelectrica terminated these contracts as of 1 August 2012.*"

Claimant: *Alps Finance and Trade AG (Switzerland)*

Respondent: *Slovakia*

Applicable BIT: Switzerland – Slovakia

Rules/Type of Arbitration: UNCITRAL

Type of Investment: Assignment of receivables under a private contract

Arbitral tribunal:
Antonio Crivellaro; Hans Stuber; Bohuslav Klein

Status of case/Decisions: Award, 5 March 2011

Published: Yes (in redacted form) (http://www.italaw.com/cases/74)

Outcome: Dismissed all claims on the basis of lack of jurisdiction of the tribunal. Claimant to pay full cost of arbitration.

Summary: Lack of jurisdiction because the Swiss claimant could not be considered an "investor"; despite being incorporated in Switzerland, it failed to prove that it maintained a "seat" or "real economic activities" in that jurisdiction, as required by the BIT. As to whether there was an "investment", the tribunal established that the one-off purchase of receivables by claimant did not constitute an investment under the BIT; an investment "implies … certain minimum requirements, such as duration, contribution and risk". The claim did not even pass the prima facie plausibility test (on the merits) required of a BIT claim. Possible errors by the Slovakian courts did not in themselves constitute a breach of BIT and claimant would not be able to substantiate a claim for denial of justice.

Claimant: *Border Timbers Ltd, Border Timbers International (Private) Ltd (Switzerland), and Hangani Development Co. (Private) Ltd.*

Respondent: *Zimbabwe*

Applicable BIT: Switzerland – Zimbabwe

Rules/Type of Arbitration: ICSID Case No. ARB/10/25

Type of Investment: Commercial farms and forestry plantations

Arbitral tribunal:
Yves Fortier; David Williams; An Chen

Status of case/Decisions: Pending

Published: Procedural orders and decision on provisional measures (http://www.italaw.com/cases/1470)

Summary: Proceedings brought in parallel to the *Bernhard von Pezold* case mentioned below. Essentially the same facts.

Claimant: *Cervin Investissements S.A. (Switzerland) and Rhone Investissements S.A (Switzerland)*

Respondent: *Costa Rica*

Applicable BIT: Costa Rica – Switzerland

Rules/Type of Arbitration: ICSID Case No. ARB/13/2

Type of Investment: Natural gas distribution venture

Arbitral tribunal:
Alexis Mourre; Ricardo Ramirez; Andres Jana

Status of case/Decisions: Pending. Decision on Jurisdiction, 15 December 2014 (Spanish)

Published: Yes (ICSID webpage)

Outcome: The Tribunal partially upheld jurisdiction over the investors' claims. Pending on the merits.

Summary: The Tribunal upheld jurisdiction rejecting respondents objections based on *ratione temporis*, *mala fide* corporate restructuring, alleged prior triggering of the claim by a parent company and diplomatic protection that had already been pursued (by Mexico). However some allegations made by claimant were found, *prima facie*, to be incapable of breaching the BIT even if true (*Ricardo Ramirez* dissenting); hence the Tribunal dismissed the latter.

Claimant: *Emmis International BV (Netherlands), Emmis Radio Operating BV (Netherlands) and MEM Magyar Electronic Media (Hungarian company controlled by a Swiss national)*

Respondent: *Hungary*

Applicable BIT: Switzerland – Hungary; Netherlands – Hungary

Rules/Type of Arbitration: ICSID Case No. ARB/12/2

Type of Investment: Radio broadcasting enterprises

Arbitral tribunal:
Campbell McLachlan; Marc Lalonde; Christopher Thomas

Status of case/Decisions: Award, 16 April 2014

Published: Yes (ICSID webpage)

Outcome: The Tribunal held that it lacked jurisdiction since the investor had no rights capable of being expropriated. Both parties were ordered to bear their own costs of legal representation and half of the arbitration costs.

Summary: The Tribunal considered whether the rights of the claimant, namely the right to participate in the tender for a renewal of a radio license, were rights to property capable of being expropriated and held that they were not.

Claimant: *Flughafen Zürich A.G. (Switzerland) and Gestión e Ingenería IDC S.A. (Chile)*

Respondent: *Venezuela*

Applicable BIT: Switzerland – Venezuela

Rules/Type of Arbitration: ICSID Case No. ARB/10/19

Type of Investment: Operation of an international airport

Arbitral tribunal:
Juan Fernández-Armesto; Henri Alvarez; Raúl E. Vinuesa

Status of case/Decisions: Award, 18 November 2014

Published: Yes (http://www.italaw.com/cases/1524)

Outcome: Award accepting the expropriation and denial of justice claims in favour of the investors, with an order for the host state to pay a large part of the Claimants' costs and all the costs of the arbitration.

Summary: Claim for expropriation, breach of FET and arbitrary and discriminatory measures (denied) and denial of justice in relation to a right to administer and exploit an airport in Venezuela. Fork in the road clause did not bar claim because claim was brought under different legal bases, the object was different and the relief requested was different. Denial of justice occurred as a result of a complete lack of reasoning, deciding an issue without authority to do so, breach of right to be heard and a decision taken for a political purpose.

Claimant: *Holcim Ltd. (Switzerland) Caricement B.V. (Netherlands), Holcim Limited (Switzerland), Holderfin B.V. (Netherlands)*

Respondent: *Venezuela*

Applicable BIT: Switzerland – Venezuela

Rules/Type of Arbitration: ICSID Case No. ARB/09/3

Type of Investment: Cement production enterprise

Arbitral tribunal:

Juan Fernandez-Armesto; Georges Abi-Saab; Charles Brower

Status of case/Decisions: Request for suspension of proceedings filed by parties on 10 September 2010 (ICSID webpage). Settled, 13 September 2010.

Published: No

Outcome: Parties agreed that Respondent would pay Claimant USD 650 million (GAR, 21 September 2010).

Summary: The claimants claimed that their investment had been expropriated.

Claimant: *Holiday Inn S.A. (Switzerland), Occidental Petroleum Corporation (USA)*

Respondent: *Morocco*

Applicable BIT: Switzerland – Morocco

Rules/Type of Arbitration: ICSID Case No. ARB/72/1

Type of Investment: Operation of hotels

Arbitral tribunal:
Gunnar Lagergren; J.C. Schultsz; Paul Reuter

Status of case/Decisions: Settled

Published: No (abstract in Pierre Lalive, The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems, 51 Brit.Yb.Int'l L. 1980, at 123 et seq.)

Outcome: Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance issued by the Tribunal on 17 October 1978 pursuant to Arbitration Rule 43(1)).

Summary: The dispute concerned the agreement between the host state and an investor for the construction of four hotels. The dispute raised questions related to the authority of tribunals to order provisional measures (affirmative even if request was rejected) and various jurisdictional objections (nationality, consent to arbitration and competence of local courts).

Claimant: *Intersema Bau AG (Switzerland)*

Respondent: *Libya*

Applicable BIT: Libya – Switzerland

Rules/Type of Arbitration: UNCITRAL

Type of Investment: Construction of road, water, sewage and lighting infrastructure

Arbitral tribunal:
Piero Bernardini; Veijo Heiskanen; Isabelle Poncet

Status of case/Decisions: Award, 1 January 2010

Published: No (See IAReporter story of 27 June 2012)

Outcome: Award accepting FET claim and umbrella clause claim in favour of investor. Libya to pay compensation for breaches of BIT of CHF 13 million.

Summary: Claimant's construction contracts constituted an investment (under the *Salini* test), in particular because of their duration. Settlement agreement relating to the contracts between parties (with which Libya did not comply) did not constitute an investment in itself, but was agreement derived from the original investment and disputes relating to it therefore fell within the scope of the BIT's consent to arbitrate. Libya's failure to comply with settlement agreement and the circumstances surrounding this failure cumulatively constituted a breach of FET standard in BIT, and because the settlement agreement's conclusion constituted an exercise of sovereign authority and it represented an obligation towards the investment, of the umbrella clause. Claims for FSP and expropriation were rejected. Compensation was awarded of the amount withheld under the settlement agreement rather than the full amount owed under the original contracts.

Claimant: *Koch Minerals Sarl (Switzerland) and Koch Nitrogen International Sarl (Switzerland)*

Respondent: *Venezuela*

Applicable BIT: Switzerland – Venezuela

Rules/Type of Arbitration: ICSID Case No. ARB/11/19

Type of Investment: Shares in a company owning a fertilizer plant

Arbitral tribunal:
V.V. Veeder; Florentino Feliciano; Marc Lalonde

Status of case/Decisions: pending

Published: No (See IAReporter stories of 4 August 2011 and 11 March 2014)

Outcome: Pending. The ICSID Administrative Council rejected challenges to an arbitrator; as well as to all three members of the tribunal.

Summary: The investor alleges nationalisation of a fertilizer plant.

Claimant: *Konsortium Oeconomismus (Switzerland)*

Respondent: *Czech Republic*

Applicable BIT: Czech Republic – Switzerland

Rules/Type of Arbitration: Not available

Type of Investment: Loan to a local company for construction of waste incineration plan

Arbitral tribunal:
Eduardo Silva Romero; Andreas Ueltzhöffer; Sabine Konrad

Status of case/Decisions: Award, February 2012

Published: No (See IAReporter story of 26 March 2012)

Outcome: Claims were dismissed and the investor was ordered to bear the legal costs of the government.

Summary: Claimant had lent funds to a local company to build a waste incineration plant. The borrower having become insolvent, the claimant called upon guarantees given by the Ministry of Environment. Claimant alleged treaty breaches by local courts that had held the guarantees to be invalid, as well as governmental agencies. The tribunal dismissed all claims and ordered claimant to reimburse respondent's legal costs.

Claimant: *Branimir Mensik (Switzerland)*

Respondent: *Slovakia*

Applicable BIT: Slovakia – Switzerland

Rules/Type of Arbitration: ICSID Case No. ARB/06/9

Type of Investment: Mineral water spring project

Arbitral tribunal:
Michael Reisman; Karl-Heinz Böckstiegel; Bohuslav Klein

Status of case/Decisions: Discontinuance of proceedings, 9 December 2008

Published: No

Outcome: Proceedings discontinued for lack of payment of advances.

Summary: None publicly available

Claimant: *Bernhard von Pezold (Swiss-German) and Others*

Respondent: *Zimbabwe*

Applicable BIT: Switzerland – Zimbabwe; Germany – Zimbabwe

Rules/Type of Arbitration: ICSID Case No. ARB/10/15

Type of Investment: Commercial farms and forestry plantations

Arbitral tribunal:
Yves Fortier; David Williams; An Chen

Status of case/Decisions: Pending

Published: Procedural orders and decision on provisional measures (http://www.italaw.com/cases/documents/1810)

Summary: Claimants owned three estates which they claim were expropriated under Zimbabwe's land distribution policy. They also claim damages for Zimbabwe's alleged failure to provide FET and FSP resulting in repeated invasions of its estates by veterans of the war of independence and supporters of the Zanu PF party and the setting on fire of some 7,000 ha of land in 2009. Tribunal has rejected petition for leave to submit an *amicus curiae* brief by ECCHR as it did not satisfy Rule 37(2) ICSID Arbitration Rules (GAR, 14 July 2010).

Claimant: *Philip Morris Brands SARL (former FTR Holdings) (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay)*

Respondent: *Uruguay*

Applicable BIT: Switzerland – Uruguay

Rules/Type of Arbitration: ICSID Case No. ARB/10/7

Type of Investment: Manufacturing facilities, royalty payments and trademark rights in tobacco as well as shares in Uruguayan company

Arbitral tribunal:
Piero Bernardini; Gary Born; James Crawford

Status of case/Decisions: Pending. Decision on Jurisdiction, 2 July 2013

Published: Yes (ICSID webpage)

Outcome: The Tribunal upheld jurisdiction over the investors' claims. Pending on the merits.

Summary: Accepted jurisdiction as investors' activities constituted a protected investment under the BIT and therefore disregarded respondent's argument alleging: that "public health" measures were excluded from review and that deleterious business activities are not "investments" entitled to arbitration at ICSID. The Tribunal also decided to reject the objection that a denial of justice claim should be dismissed because it was raised by the claimant only at the stage of the counter-memorial and had failed to comply with the treaty's consultation and local litigation requirements..

Claimant: *Romak SA (Switzerland)*

Respondent: *Uzbekistan*

Applicable BIT: Switzerland – Uzbekistan

Rules/Type of Arbitration: UNCITRAL

Type of Investment: Wheat supply contracts (and a GAFTA Award)

Arbitral tribunal:
Fernando Mantilla-Serrano; Noah Rubins; Nicolas Molfessis

Status of case/Decisions: Award, 26 November 2009

Published: Yes (http://www.italaw.com/cases/documents/919)

Outcome: Dismissed claims for lack of jurisdiction. Parties to bear arbitration costs in equal shares and bear their own legal representation costs.

Summary: Claims for expropriation and breach of FET. Broad definition of "investment" in BIT not interpreted in way that would "render meaningless the distinction between investments, on the one hand, and purely commercial transactions on the other." Term "investment" cannot be supposed to have a different meaning under ICSID Convention than under the BIT. If this was the case, the substantive protections afforded to the investor under the BIT would vary depending on the dispute settlement mechanism seized. Determination of the existence of "investment" must be made with reference to entire economic transaction at issue. Claimant's sale of goods contracts did not fulfil definition of investment: they did not provide a contribution indicative of investment, they did not reflect the duration associated with investments, and they only entailed ordinary business risk. A GAFTA Award obtained on the basis of the contracts was merely an embodiment of Claimant's contractual rights and was therefore not an "investment either".

Claimant: *SGS Société Générale de Surveillance S.A. (Switzerland)*

Respondent: *Pakistan*

Applicable BIT: Switzerland – Pakistan

Rules/Type of Arbitration: ICSID Case No. ARB/01/13

Type of Investment: Service agreement for pre-shipment inspection of goods

Arbitral tribunal:
Florentino Feliciano; André Faurès; Christopher Thomas

Status of case/Decisions: Decision on Objections to Jurisdiction, 6 August 2003; Discontinuance of proceedings, 23 May 2004

Published: Decision on Objections to Jurisdiction (ICSID webpage)

Outcome: The Tribunal upheld its jurisdiction and a settlement was reached between the parties, whereby SGS agreed to pay USD 2 million to Pakistan and presented a written apology

Summary: The dispute arose out of a pre-shipment inspection agreement and raised for the first time questions regarding "umbrella clauses" (albeit narrowly worded in this case) and whether such clauses were able to elevate a contractual claim to a treaty claim. Tribunal held that it was not competent to decide over the breaches of the parties' agreement and declined jurisdiction over the umbrella clause claims. Respondent also brought other jurisdictional objections based on *lis pendens*, waiver and estoppel, which were rejected.

Claimant: *SGS Société Générale de Surveillance S.A. (Switzerland)*

Respondent: *Paraguay*

Applicable BIT: Switzerland-Paraguay

Rules/Type of Arbitration: ICSID Case No. ARB/07/29

Type of Investment: Contract for inspection of goods located abroad and destined for shipment to Paraguay

Arbitral tribunal/Annulment Committee:
Tribunal: Stanimir Alexandrov; Donald Donovan; Pablo Garcia Mexia
Annulment Committee: Eduardo Zuleta; Abdulqawi Ahmed Yusuf; Rodrigo Oreamuno

Status of case/Decisions: Award, 10 February 2012; Decision on Annulment, 19 May 2014

Published: Yes (http://www.italaw.com/cases/1016)

Outcome: Award in favour of SGS, ordering Paraguay to pay compensation. Annulment application made by Paraguay dismissed in its entirety. Paraguay ordered to pay cost of annulment proceeding.

Summary: Tribunal rejected the respondent's argument that its non-payment of invoices did not constitute a breach of the BIT because it was not an "abuse of government power". "Abuse of government power" not correct test. Instead, the tribunal found that the umbrella clause included the obligation to observe contractual commitments. The tribunal also decided that a claim for contractual breach did not first have to undergo the proceedings specified in the contractual forum selection clause. To the extent a treaty breach was being invoked, contractual commitments could be decided by the tribunal. Indeed, the tribunal found that Paraguay failed to guarantee the observance of the commitments entered into with respect to SGS's investment. The annulment committee held that the tribunal did not manifestly exceed its powers in interpreting the umbrella clause and that there was no failure to state reasons.

Claimant: *SGS Société Générale de Surveillance S.A (Switzerland)*

Respondent: *Philippines*

Applicable BIT: Switzerland – Philippines

Rules/Type of Arbitration: ICSID Case No. ARB/02/6

Type of Investment: Service agreement for pre-shipment inspection of goods

Arbitral tribunal:
Ahmed Sadel El-Kosheri; Antonio Crivellaro; James Crawford

Status of case/Decisions: Decision on Jurisdiction, 29 January 2004; Award embodying Settlement Agreement, 11 April 2008

Published: Yes (ICSID webpage)

Outcome: SGS settled the matter on 11 April 2008 for a sum of USD 148 million.

Summary: SGS claimed that it had not been paid for customs inspection services. Claims for breach of FET, expropriation without compensation and breach of the umbrella clause. The Tribunal found that contractual claims fell within its jurisdiction under the umbrella clause. However, the scope of the obligations were to be determined by the contract, but the performance of the obligations could be taken up as a BIT matter. Tribunal also found forum-selection clause in contract applicable; as a result, SGS was to litigate any dispute as to the extent or scope of the obligations before Philippine courts or

to settle the issue with the counterparty. Only once scope so determined would the claim be admissible in order for a BIT tribunal to determine performance.

Claimant: *Swiss investor (unnamed)*

Respondent: *South Africa*

Applicable BIT: Switzerland – South Africa

Rules/Type of Arbitration: UNCITRAL

Type of Investment: Ownership of land for a potential conference centre and game farm

Arbitral tribunal:
Dan Brennan; Günther Frosch; Gilbert Marcus

Status of case/Decisions: Award, 19 October 2004

Published: No (See IAReporter story of 22 October 2008)

Outcome: Award in favour of the Swiss investor, ordering South Africa to pay compensation of 6.6 million rand.

Summary: South Africa breached the BIT obligation to provide full protection and security due to the failure of police to protect the property of the investor. The claim of expropriation, however, was dismissed for insufficient evidence since the land reform process on which the claim was based was still ongoing. The damages were reduced to take account of the negligence of the investor.

Claimant: *Swisslion DOO Skopje (Switzerland)*

Respondent: *Former Yugoslav Republic of Macedonia*

Applicable BIT: Macedonia (former Yugoslav Republic of Macedonia) – Switzerland BIT

Rules/Type of Arbitration: ICSID Additional Facility, ICSID Case No. ARB/09/16

Type of Investment: Share sale agreement for stake in food production company.

Arbitral tribunal:
Gilbert Guillaume; Daniel Price; Christopher Thomas

Status of case/Decisions: Award, 6 July 2012

Published: Yes (http://www.italaw.com/cases/1516)

Outcome: Award accepting FET claim in favour of Swisslion, ordering Macedonia to pay compensation for breach of the BIT.

Summary: Based on the understanding that FET "basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is meant to guarantee justice to foreign investors", the tribunal found that Respondent had breached the FET standard. The breach consisted of a series of measures that collectively amounted to a composite act. A claim for expropriation based on a court decision to terminate Claimant's share sale agreement was rejected on the basis that judicial expropriation requires an "unlawful activity of the court itself". Claims relating to the umbrella clause and non-impairment clause as well as a claim based on denial of justice were dismissed.
